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In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF MINNESOTA, PETITIONER

v.

CLOVER LEAF CREAMERY CO., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether a state ordinance banning the sale of milk products in nonreturnable, nonrefillable plastic containers violates the Equal Protection Clause of the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

This case concerns the validity of a state statute banning the use of nonreturnable, nonrefillable plastic milk containers on the ground that such containers present a solid waste management problem, promote energy waste, and deplete natural resources. The interest of the United

States in solid waste management and energy and resource conservation is compelling. Energy conservation has been referred to by the President as the "cornerstone" of our national energy policy. President's Address to the nation, *The Energy Problem*, April 18, 1977, 13 Weekly Comp. of Pres. Doc. 560, 562, 563 (April 25, 1977).

Numerous federal statutes reflect the critical dimensions of the energy crisis and demonstrate the federal interest in eliminating energy waste and in promoting energy conservation. See, *e.g.*, National Energy Conservation Policy Act, 42 U.S.C. (Supp. II) 6344a, 6346, 6371 note, 6372 note, 8201, 8251, 8253, 8273; Public Utility Regulatory Policies Act of 1978, 16 U.S.C. (Supp. II) 2601, 2611; Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. (Supp. II) 8301; National Energy Extension Service Act, 42 U.S.C. (Supp. I) 7001; Solar Energy Research, Development, and Demonstration Act of 1974, 42 U.S.C. 5551; Solar Photovoltaic Energy Research, Development, and Demonstration Act of 1978, 42 U.S.C. (Supp. II) 5581; Energy Conservation and Production Act, 42 U.S.C. (Supp. II) 6801, 6831; Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 753.[1] Many of the federal programs established by these statutes depend on state and local development, implementation, and enforcement efforts. See, *e.g.*, National Energy Conservation Policy Act, 42 U.S.C. (Supp. II) 8213–8215, 8218–8220 (state and residential energy conservation plans, nonregulated utility plans, and home heating supplier plans); Energy Policy and Conservation Act, 42 U.S.C. 6322, 6324, 6327 (state

[1] Several federal statutes emphasize the importance of the recovery of energy and materials from waste. See Resource Conservation and Recovery Act of 1976, 42 U.S.C. (and Supp. II) 6901; National Energy Conservation Policy Act, 42 U.S.C. (Supp. II) 8201; Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. (and Supp. II) 5901 *et seq.*

energy conservation plans); Energy Conservation and Production Act, 42 U.S.C. 6837 (grants to state to facilitate adoption and implementation of certain conservation measures); Public Utility Regulatory Policies Act of 1978, 16 U.S.C. (Supp. II) 2621 (state utility regulatory agency must consider certain federal ratemaking standards based in part on energy efficiency and conservation). See also Department of Energy Organization Act, 42 U.S.C. (Supp. I) 7321(a)(2) (national energy policy plan must consider views of state, regional, and local agencies).

The federal government often provides guidance and financial and technical assistance to state, regional and local agencies in dealing with solid waste management problems, particularly those relating to resource recovery and conservation. The federal policy, in significant part, is carried out through local planning and implementation efforts, including regulatory measures. See Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. (and Supp. II) 6902(1), (8), 6941–6949; National Energy Conservation Policy Act, 42 U.S.C. (Supp. II) 8201; Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. (and Supp. II) 5901 *et seq.* (federal support for municipal waste reprocessing demonstration facilities). This type of statutory scheme means that state experimentation—like Minnesota's—with different methods of pursuing these objectives is central to the ability of the nation, as a whole, to develop energy efficient, environmentally acceptable solid waste management programs.

Moreover, Minnesota's ban on plastic milk containers is of concern to the United States because of the national policy mandating a decrease in dependence on nonrenewable resources such as oil and gas (needed to make plastic) in favor of the utilization of renewable resources such as

wood. The security of the nation—both military and economic—depends on our energy independence. The National Environmental Policy Act of 1969, 42 U.S.C. 4331–4332, requires the federal government to use "all practicable means" "to enhance the quality of renewable resources" and to implement its programs and direct its policies toward that end. The President has called for the nation to stop "our dependence on foreign oil dead in its tracks* * *." President's address to the nation, *Energy and National Goals*, July 15, 1979, 15 Weekly Comp. of Pres. Doc. 1235, 1239 (July 23, 1979). Numerous congressional findings and statutory purposes also address the need for decreased dependence on oil and gas. See Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. (Supp. II) 8301(b)(1), (2), (3), (6); National Energy Conservation Policy Act, 42 U.S.C. (Supp. II) 6371 note, 6372 note, 8201(a), 8251; Public Utility Regulatory Policies Act of 1978, 16 U.S.C. (Supp. II) 2601(4); Solar Energy Research, Development, and Demonstration Act of 1974, 42 U.S.C. 5551(a)(3), (4). These efforts, too, in large part rely on state government initiative and contribution.

In sum, a ruling by this Court striking down a state statute experimenting with solutions to the major national problems of waste disposal and energy conservation would be a significant setback to the federal government's efforts in these areas, and would render more difficult the efforts of the Environmental Protection Agency, the Department of Energy, and the Council on Environmental Quality to implement national energy and environmental policy.

STATEMENT

1. After concluding that the use of nonreturnable nonrefillable milk containers promotes energy waste, presents a solid waste management problem, and depletes natural

resources, the 1977 Session of the Minnesota Legislature enacted 1977 Minn. Laws, ch. 268 (Pet. 2), codified as Minn. Stat. §§ 116F.21, 116F.22 (West Supp. 1977). That statute banned the sale of nonreturnable, nonrefillable rigid or semi-rigid plastic milk containers (*id.* at § 116F.22(1)).[2] The legislation was designed to encourage the use of returnable, refillable containers (Pet. 2).

2. Respondents filed a complaint in Ramsey County District Court challenging the constitutionality of the Minnesota statute (A. 1–9).[2a] On April 5, 1978, after trial, the district court concluded that the statute deprived respondents of their constitutionally protected rights under the Commerce, Due Process and Equal Protection Clauses (Pet. App. A21). The Supreme Court of Minnesota affirmed the trial court's decision on equal protection grounds and did not reach the other issues (Pet. App. A1). The court concluded that the challenged statute, although purporting to further legitimate state interests, in fact created a classification not rationally related to those interests (Pet. App. A2–A3). The court's conclusion was based on two findings. First, the court found that the environmental effects of paper containers were no less harmful than the effects of plastic nonrefillable containers (Pet. App. A5). Second, the court found that the classification did not further the Act's goal of encouraging the use of refillable milk containers (*ibid.*)

In determining that the environmental effects of paper containers were no less harmful than those of plastic con-

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[2] The prohibition provides in full: "No person shall sell at retail or offer for sale at retail in this state any milk or fluid milk product as defined in Minnesota Statutes, Section 32.391, other than sour cream, cottage cheese, and yogurt, in a nonreturnable, nonrefillable, rigid or semi-rigid container at least 50 percent of which is plastic."

[2a] "A." refers to the Appendix to petitioner's brief in the Minnesota Supreme Court.

tainers, the court weighed a number of factors. It first considered the comparative effects of solid waste management; it noted that landfill is the major method of disposal of solid waste and that paper containers are bad for landfills since they decompose quickly, reducing landfill stability and producing leachates that drain into groundwater (Pet. App. A6). The court also considered the relative merits of the two materials for disposal by incineration, by recycling, and by source reduction and gave plastic a higher rating than paper in each category (*id.* at A9–A10). The court next found that paper containers are not superior to plastic nonrefillable containers in terms of energy waste (Pet. App. A10–A12). The court questioned the accuracy of the report prepared for the Environmental Protection Agency,[3] because the study had included in its calculations the energy value of wood waste, but not of the waste from the production of plastic (off-gases), and had allegedly overstated the average weight of plastic nonrefillable containers in Minnesota.

The court also concluded that the classification was not reasonably related to the legislature's stated goal of conserving natural resources, reasoning that the amount of oil and gas used in making plastic containers is quite small and their use is less likely to deplete natural resources than the use of paper containers, which are less recyclable (Pet. App. A12–A13). Although increased use of refillable milk containers would conserve natural resources, the court found no evidence that a ban on plastic containers would promote such an increase (*id.* at A13–A14). Finally, the court determined that the asserted state interest in stopping plastic containers from gaining a foothold in the

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[3] Resource and Environmental Profile Analysis of Five Milk Container Systems, prepared by the Midwest Research Institute. See Pet. App. A7 n.11.

market was "speculative and illusory" in the absence of evidence of any current state plans for more comprehensive regulations in this area (Pet. App. A15). In sum, the court stated that while it is true that a legislature may attempt to eradicate one evil at a time without affronting equal protection guarantees, the initial step must have a rational relationship to a legitimate state interest, and this ban did not (Pet. App. A15–A16).

Justice Wahl dissented, although he agreed that the evidence indicated that plastic nonrefillable containers are no worse environmentally than paper containers. He concluded that *New Orleans* v. *Dukes*, 427 U.S. 297 (1976), required the conclusion that the ban on plastic containers was a constitutionally permissible "first step" by the legislature (Pet. App. A18).[4]

SUMMARY OF ARGUMENT

The Minnesota Supreme Court's detailed inquiry into the logical and factual basis of the statutory ban was improper. This Court has long since rejected that degree of judicial scrutiny of state and local economic legislation challenged under the Equal Protection Clause of the Fourteenth Amendment. In considering the relative merits of plastic and paper containers the court, in effect, acted as a "super-legislature" (see *Shapiro* v. *Thompson*, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting)) and made assumptions that impermissibly intruded into the realm of legislative decision-making. The courts below made findings concerning relevant facts that were inconsistent with the findings reasonably made by the state legislature. Furthermore, the courts' conclusions concerning the relative

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[4] Justice Wahl also rejected respondent's argument that the statute violated the Commerce Clause or Due Process requirements (Pet. App. A20).

merits of the two materials were insufficient to justify a ruling that the ban on nonreturnable, nonrefillable plastic milk containers was unconstitutional. Even if it were true that plastic is no worse environmentally than paper, the state could constitutionally limit its ban to plastic containers. That would be a proper initial measure. In addition, the Minnesota courts failed to give sufficient weight to the need to utilize renewable resources, such as wood, whenever feasible as a substitute for nonrenewable resources, such as fossil fuels (particularly imported oil and gas). This factor, alone, is sufficient under the Constitution to justify the legislative distinction between plastic and paper containers.

ARGUMENT

THE STATE OF MINNESOTA'S BAN ON NONRETURNABLE NONREFILLABLE PLASTIC MILK CONTAINERS DOES NOT OFFEND THE EQUAL PROTECTION GUARANTEE OF THE FOURTEENTH AMENDMENT

As Mr. Justice Brandeis stated in dissent in *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932), "[i]t is one of the happy incidents of the federal system that a single courageous State may * * * try novel social and economic experiments." To reap the full advantage of this "happy incident," the states must be afforded wide leeway in developing alternative approaches to complex and difficult problems. Cf. *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 71 (1978). Here the State of Minnesota addressed the complex problems of solid waste management, energy waste, and resource depletion—intractable problems for which state experimentation is essential.[5] It is to be expected that such state experimentation will often begin

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[5] State regulation of beverage containers, in particular, is a relatively new phenomenon and states are experimenting with many dif-

with laws that are underinclusive or contain "loopholes." It is precisely in dealing with such problems that the state legislature must proceed by stages, evaluating the effectiveness of the initial legislation before deciding on the next step. Even if the first steps involve underinclusive laws, they do not, for that reason, violate any equal pro-

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ferent types of programs. Reduction of garbage and litter and conservation of energy and raw material are goals of these programs. Different types of programs include (1) mandatory deposits on beverage containers (equivalent to a ban on nonreturnable containers), see, *e.g.*, Conn. Gen. Stat. Ann. § 22a-78 (West Supp. 1980); Del. Code Ann. tit. 7, § 6054 (Supp. 1978); Iowa Code Ann. § 455C (West Supp. 1980); Me. Rev. Stat. Ann. tit. 32, § 1863 (Supp. 1979); Mich. Stat. Ann. § 18.1206(12) (Supp. 1979); Ore. Rev. Stat. § 459.820 (1979); Vt. Stat. Ann. tit. 10, § 1522 (Supp. 1977); (2) taxes on products likely to end up as litter, see, *e.g.*, Cal. Rev. & Tax Code § 42000 *et seq.* (West 1979); Colo. Rev. Stat. § 24-32-1001 (Supp. 1978); Conn. Gen. Stat. Ann. § 22a-84 (West Supp. 1980); Ky. Rev. Stat. § 224.955 (Supp. 1978); Vt. Stat. Ann. tit. 10, § 1522a (Supp. 1977); Va. Code § 10-201.1 (1978); Wash. Rev. Code §§ 70.93.120, 70.93.130 (1975); and (3) bans on specific types of containers, see, *e.g.*, Del. Code Ann. tit. 7, § 6059 (Supp. 1978) (ban on nonrefillable glass beverage containers); Iowa Code Ann. § 455C.8 (West Supp. 1980) (prohibition of metal beverage containers with detachable parts (*i.e.*, "pull tab" containers)); Me. Rev. Stat. Ann. tit. 32, § 1868 (Supp. 1979) (ban on pull tab metal beverage containers and plastic retainer rings); Mass. Gen. Laws Ann. ch. 94, § 319 (West Supp. 1980) (ban on pull tab metal beverage containers); Mich. Stat. Ann. § 18.1206(12) (Supp. 1979) (ban on pull tab metal beverage containers); Minn. Stat. Ann. § 325.248 (West Supp. 1980) (ban on pull tab metal containers for carbonated soft drink, beer, other malt beverage or tea in liquid form; see also Minn. Op. Att'y Gen. 135b-6a (Jan. 25, 1979) (pull tab prohibition applies to all metal beverage containers)); Ore. Rev. Stat. § 459.850(3), (4), (5) (1979) (ban on pull tab beverage containers and nonbiodegradable holding devices); S.C. Code § 39-17-410 (Supp. 1979) (ban on pull tab metal containers for carbonated soft drink or malt beverages); S.D. Codified Laws Ann. § 34A-7-5 (1977) (ban on nonreusable, nonrecyclable, and nonbiodegradable containers); Vt. Stat. Ann. tit. 10, § 1525 (Supp. 1977), as amended by An Act Relating to the Sale of Beverage Containers, 1979 Vt. Acts No. 63, § 1 (enacted April 27, 1979) (ban on nonrefillable glass beverage containers, on beverage containers with detachable parts other than a piece of pressure sensitive tape and on nonbiodegradable (plastic) holding devices).

tection guarantees of the Fourteenth Amendment. See A. Bickel, *The Least Dangerous Branch* 225–226 (1962).

It is settled that a "State [is] not bound to deal alike with all * * * classes, or to strike at all evils at the same time or the same way." *Semler* v. *Dental Examiners*, 294 U.S. 608, 610 (1935). See *New Orleans* v. *Dukes*, *supra*, 427 U.S. at 303, 305–306. Thus, this Court has upheld a prohibition against some, but not all, milk product substitutes, *United States* v. *Carolene Products Co.*, 304 U.S. 144, 151 (1938); a partial ban on vehicular advertising, *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 110 (1949); and a regulation covering some, but not all, eyeglass sellers, *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955).

Despite this settled line of precedents, the Minnesota Supreme Court struck down Minnesota's ban on milk containers because it failed to prohibit both plastic and paper nonreturnable, nonrefillable containers. The court apparently based its invalidation of the plastic milk container ban on the assumption that all those persons who would have bought plastic milk containers would buy nonreturnable paper containers if the plastic containers were banned; consequently, there would be no net positive impact from the ban if plastic is no worse than paper (Pet. App. A13–A14). But this assumption on the part of the court below—that the plastic and paper containers are, in effect, perfect economic substitutes for each other—is inappropriate: the legislature could reasonably have reached a different conclusion. Indeed, the Minnesota legislature evidently concluded that the initial step of a ban on certain plastic milk containers would begin to address the problems of solid waste management, energy waste, and resource depletion. Without a doubt, the consumer and manufacturer response to the ban will provide more in-

formation, upon which the legislature may rely in formulating its next response to these complex problems.[6] The Minnesota court's predictions concerning the result of the ban and its bland assumption that convenience will always be the predominant factor in consumer choice (Pet. App. A13–A14) is a poor substitute for this empirical evidence. It is also a judicial intrusion into the ongoing legislative decision-making process that is not condoned by the Equal Protection Clause of the Fourteenth Amendment.

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[6] Vermont, which enacted one of the first beverage container laws, illustrates this process. See, generally, J. Jeffords & D. Webster, *Vermont 5 Cent Deposit* (Nov. 1977) reprinted in *Mandatory Deposits on Beverage Containers—Oversight Hearing Before the Subcomm. on Transportation* and *Commerce of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. 12–28 (1978) (statement of Rep. Jeffords (Vt.)). In 1953, Vermont adopted the first mandatory beverage container deposit law in the nation (*id.* at 12). That law prohibited only the sale of beer or ale in nonreturnable glass containers and in 1954 was upheld as constitutional by the Vermont Supreme Court. See *Anchor Hocking Glass Corp.* v. *Barber*, 118 Vt. 206, 105 A. 2d 271 (1954). After concluding that a more effective law was necessary, the legislature passed a more comprehensive deposit law in 1972. That law applied to both beer and soft drink and to all types of containers. See J. Jeffords & D. Webster, *Vermont 5 Cent Deposit, supra*, at 14. The new deposit law, however, did not become effective until September 1, 1973; a litter tax on nonreturnable containers was imposed as an interim measure, in part to determine if a stricter measure such as a ban was really necessary (*id.* at 13–14). As it turned out, the tax was not sufficient and the comprehensive deposit program became effective in 1973. Indeed, even the more comprehensive deposit law failed to have a substantial impact because of industry resistance (*id.* at 14.). The use of refillable beer bottles was not mandated and that type of container remained virtually non-existent (*ibid.*). Consequently, in 1975, the legislature passed a package of amendments designed to strengthen the then existing law. These amendments included a prohibition on nonrefillable glass beverage containers as well as a prohibition on pull tab beverage containers and on plastic loop retainers. See Vt. Stat. Ann. tit. 10, § 1525 (Supp. 1977).

A. The Minnesota Supreme Court Improperly Questioned The Wisdom Of Minnesota's Ban On Plastic Milk Containers

Although purporting to recognize "the deference that is accorded to the legislature when the present type of statute is analyzed on equal protection grounds" (Pet. App. A5), the court below in fact conducted an analysis much more akin to the strict scrutiny standard applied to classifications based on suspect criteria such as race, or those that trench on certain fundamental constitutional rights such as voting and free speech.

The statute challenged in this action involves local economic regulation; it simply restricts certain commercial activity. The standard of judicial review of such regulations was reiterated by this Court in *New Orleans* v. *Dukes*, 427 U.S. 297, 303–304 (1976) (per curiam):

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step, *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. *See, e.g. Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488–489 (1955). In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in

> areas that neither affect fundamental rights nor proceed along suspect lines, *see, e.g., Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

In cases like this one, where there is no allegation of invidious discrimination, the statute is entitled to a strong presumption of validity. Only if the statutory classification is "wholly irrelevant," *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961) (Sunday ban on certain commercial activity upheld); *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (state police jurisdictional statutes upheld), and the reviewing court can only conclude that the classification is totally irrational, may the court strike down the statute on equal protection grounds. See, *e.g., Lewis* v. *United States*, No. 78–1595 (Feb. 27, 1980), slip op. 10; *Barry* v. *Barchi*, 443 U.S. 55, 67 (1979); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Whitney* v. *California*, 274 U.S. 357, 369 (1927).[7]

One aspect of the presumption of legislative validity is the settled principle that a reviewing court may conduct only a limited inquiry into the factual bases of the statute. Because a legislative factual determination is presumed valid, the challenger, to be successful, must show not that his facts are more likely to be true than those relied upon by the legislature, but that the legislature's facts could not reasonably be conceived to be true. See L. Tribe, *American Constitutional Law* § 16–3 (1978) ("the conceivable

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[7] In only one case (*Morey* v. *Doud*, 354 U.S. 457 (1957)) during the last fifty years has this Court invalidated an economic regulation under the Equal Protection Clause, and it has recently characterized that decision as "erroneous." See *New Orleans* v. *Dukes*, *supra*, 427 U.S. at 306.

basis test"). In *Vance* v. *Bradley*, 440 U.S. 93, 110–111 (1979) the Court commented,

> [T]his case, as equal protection cases recurringly do, involves a legislative classification contained in a statute. In ordinary civil litigation, the question frequently is which party has shown that a disputed historical fact is more likely than not to be true. In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker. [Citation omitted.]

Therefore, if a state statute serves a legitimate state purpose, and if the means the state adopted are rationally related to the achievement of that purpose, the statute will withstand scrutiny under the Equal Protection Clause as long as the factual assumptions on which the means are predicated can reasonably be conceived to be true.[8]

The courts below departed from these principles. Instead of attempting to determine what the legislature

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[8] This Court has recognized the propriety of regulating container types to further legitimate public purposes and the great deference that should be accorded a government determination that the use of certain container types is in the public interest. In *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176 (1935), the Court upheld an administrative order prescribing containers for raspberries and strawberries that allegedly excluded use of a container manufactured by plaintiffs. Justice Brandeis, writing for the Court, pointed out the many conceivable reasons for requiring a certain type of container and commented (*id.* at 182):

> [A]s to each commodity there may be reasonable differences of opinion as to the type best adapted to the protection of the public. Whether it was necessary in Oregon to provide a standard container for raspberries and strawberries; and, if so, whether that adopted should have been made mandatory, involve questions of fact and of policy, the determination of which rests in the legislative branch of the state government * * *. With the wisdom of such a regulation we have, of course, no concern. We may enquire only whether it is arbitrary or capricious.

could have conceived to be true or reasonably believed to be true, they relied on their own conclusions regarding what was likely to be true (*e.g.*, Pet. App. A8, A10–A11, A31; cf. Br. in Opp. 4–5), recognizing that this required the evaluation of conflicting evidence (Pet. App. A7–A8; A10, A31). Both courts below thus confused the normal judicial fact-finding role with proper equal protection analysis,[9] contrary to this Court's explicit teachings in *Vance* v. *Bradley*, *supra*, 440 U.S. at 111, quoting *Firemen* v. *Chicago, R. I. & P. R.R.*, 393 U.S. 129, 138–139 (1968):

> The District Court's responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was 'pure speculation.'

For example, the legislature certainly could reasonably believe that a ban on one type of nonreturnable container would be likely to promote the use of returnable containers, and that plastic containers did not yet have a solid foothold in the market. But see Pet. App. A13–A14. Most clearly, the legislature, not the reviewing court, is in the best position to know if this statute is just an initial step which, if successfully taken, is likely to lead to additional legislative measures to promote the use of returnable containers. But see Pet. App. A15.

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[9] The District Court of Ramsey County believed that "as fact-finder, [it was] obliged to weigh and evaluate [the] evidence, much of which is in sharp conflict" (Pet. App. A31). The Minnesota Supreme Court "[b]ased [its conclusion] upon the relevant findings of fact by the trial court, supported by the record, and upon our own independent review of documentary sources" (Pet. App. A5).

In considering the relative merits of the two materials (plastic and paper), the reviewing court similarly disputed factual details relevant to the legislative judgment and thereby exceeded the bounds of proper judicial review of the statute. That there was evidence that paper decomposed and might pollute groundwater, that plastic might not occupy more space than paper, or that plastic containers might weigh less on the average than the legislature concluded, were all considerations in the Minnesota Supreme Court's inquiry (Pet. App. A6–A8, A11). None of them should have been. "[I]t is the very admission that the facts are arguable that immunizes from constitutional attack the congressional judgment represented by this statute." *Vance* v. *Bradley*, *supra*, 440 U.S. at 112; *Henderson Co.* v. *Thompson*, 300 U.S. 258, 264–265 (1937); *Radice* v. *New York*, 264 U.S. 292, 294 (1924).

Finally, in determining that plastic containers posed no more threat than paper ones to the announced state goals of improving solid waste management, minimizing resource depletion, and controlling energy waste, the Minnesota court impermissibly intruded into the realm of legislative decisionmaking by judging the wisdom of the legislative act. The Minnesota court found that since plastic can be returned and ground up, it therefore is recyclable and less likely than paper to deplete natural resources (Pet. App. A9, A13). But, in making such a judgment, the court necessarily assumed that the legislature could not reasonably have found that the process of returning and grinding plastic milk containers is not, in fact, occurring. Similarly, the court below concluded that if one considered the energy value of the off-gases from the fabrication of plastic, plastic was no worse in terms of energy waste than paper (Pet. App. A11–A12). But again, that assumes that those off-gases are, in fact, being captured

efficiently and being converted to useful energy. The legislature could reasonably have believed that this capture was not now occurring and would not occur without a statutory requirement.[10]

In sum, the Minnesota Supreme Court found the statute to be irrational only after improperly questioning its factual basis, resolving debatable issues in favor of those challenging the statute, and assuming facts to be true that the legislature could reasonably have conceived to be otherwise. The Equal Protection Clause was not meant to be used in such a fashion to strike down economic regulation.

B. Adequate Considerations Support Minnesota's Statutory Classification

The Minnesota Supreme Court's analysis of the ban is itself defective. In challenging the detailed bases of the statute, the court failed to focus on much broader considerations that justify the statutory distinction between paper and plastic containers. A statutory classification that appears to be underinclusive when viewed solely in terms of a single legislative objective, may instead be the result of an entirely rational legislative effort to achieve more than one objective simultaneously. See L. Tribe, *American Constitutional Law* § 16–4 (1978).

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[10] Of course, the legislature could have required that all plastic milk containers be returned, and that the manufacturers must grind them up and ensure that they are reused; it chose to ban the nonrefillable plastic container, rather than to require its return. The state has wide discretion in determining which measures to enact; that a reviewing court may perceive better or alternative ways to pursue legitimate state objectives is totally irrelevant. *Holt Civic Club* v. *City of Tuscaloosa*, *supra*, 439 U.S. at 73–74; *New Orleans* v. *Dukes*, *supra*, 427 U.S. at 303; *Cities Service Co.* v. *Peerless Co.*, 340 U.S. 179, 186 (1950). The legislature was clearly within bounds in not assuming that either total recycling of plastic or complete capture of off-gases would occur and in enacting the ban instead.

1. *Banning the newest entry into a market is a legitimate first step toward restructuring the market into a more ecologically sound system.*

It is clear from the legislative history of the statute[11] that one reason the Minnesota Legislature singled out nonreturnable, nonrefillable *plastic* containers was that they were just coming into the market; there was no widespread use of them and few dairies had as yet converted to that system. As Representative Munger stated during debate on the bill on March 10, 1977, in the Minnesota State House of Representatives: "I think it is time to act on this legislation now. Minnesota's dairy market is on the verge of making a major change over from essentially a paperboard container system to a system of primarily single use, throwaway plastic bottles" (P. Ex. J at 1). And in the Senate debate, May 20, 1977, Senator Perpich warned that if the Legislature did not act immediately, there would be so many jobs involved in producing the plastic containers that it would be politically impossible to pass such a bill (P. Ex. J at 10). Senator Luther stated clearly that the ban on the emerging use of nonreturnable plastic milk containers was a necessary first step in converting to a better system (P. Ex. J at 2):

> "I want to point out that clearly the most preferable container system would be a returnable container system for milk delivery * * *. It would be extremely difficult for us to switch back to a refillable system once [the] conversion to a throwaway plastic is made * * *. [I]t makes absolutely no sense for us to stand by and permit this delivery system to go into another nonreturnable system * * *. The issue before us is whether we should get into another throwaway

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[11] Although the legislative debates are not officially reported, respondents introduced at trial their own transcript of the debates on the container bill. This transcript is cited as P. Ex. J.

plastic system that will be very, very difficult to convert from.

This Court has recognized the propriety of such legislative considerations. In *New Orleans* v. *Dukes*, *supra*, 427 U.S. at 305, the Court upheld New Orleans' prohibition of any new pushcart vendors in the French Quarter of the city while exempting the vendors who were already there: "[R]ather than proceeding by the immediate and absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage. This gradual approach to the problem is not constitutionally impermissible.* * * The city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests * * *. We cannot say that these judgments so lack rationality that they constitute a constitutionally impermissible denial of equal protection." Banning plastic containers—the more recent entrant in the nonreturnable, nonrefillable container market — was similarly a constitutionally permissible first step.[12]

2. *The paramount need to halt the depletion of nonrenewable natural resources and to reduce our nation's dependence on foreign energy resources justifies banning plastic containers.*

Plastic is made from oil and gas, nonrenewable resources for which the nation is greatly dependent on unre-

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[12] If such considerations were not legitimate, a state legislature could find itself in a veritable constitutional "Catch-22". If the state tried to stop an enterprise contrary to the public interest in its incipiency it would be subject to attack under the Equal Protection Clause, but if it waited until the business grew and substantial investment had been made, it might be found to be susceptible to a challenge under the Takings Clause. See *Kaiser Aetna* v. *United States*, No. 78-738 (Dec. 4, 1979), slip op. 10; *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978) (emphasizing significance of "distinct, investment-backed expectations").

liable foreign sources, while paper is made from woodpulp, a renewable resource that the nation possesses in abundance. The national interest in utilizing renewable resources rather than nonrenewable resources, whenever feasible, is clear. 42 U.S.C. 4331–4332; 42 U.S.C. 5904. Although plastic can be ground up and recycled, no recycling processes are 100 percent efficient, and the creation of new plastic containers requires continuing dependence on nonrenewable resources.

The nation must try to eliminate in every possible manner any unnecessary use of oil and gas. Unnecessary utilization of these energy resources increases our reliance on foreign imports and thereby constitutes a threat to our national security. It is irrelevant that the waste involved in any one instance consumes only a relatively small amount of oil and gas; any waste may be lawfully prohibited. The need is paramount. See, *e.g.*, President's Address to the nation, *Energy and National Goals*, July 15, 1979, 15 Weekly Comp. of Pres. Doc. 1235, 1239 (July 23, 1979); Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. (Supp. II) 8301(b)(1), (2), (3), (6). Moreover, stopping this wasteful use of plastic now, when only small amounts are used for milk containers, will ensure that large amounts are not used in the future.

This Court has upheld state police measures prohibiting wasteful uses of scarce energy resources such as oil and gas. See, *e.g.*, *Walls* v. *Midland Carbon Co.*, 254 U.S. 300, 324 (1920). Moreover, equal protection attacks on state attempts to prevent wasteful uses of energy resources have been repeatedly rejected. See *Cities Service Co.* v. *Peerless Co.*, 340 U.S. 179, 185 (1950) ("It is now undeniable that a state may adopt reasonable regulations to prevent economic and physical waste of natural gas."); *Henderson Co.* v. *Thompson*, 300 U.S. 258, 267 (1937)

("The Legislature may, for the purpose of conserving natural resources, regulate their production and use"). Wood pulp can be used instead of oil and gas to make milk containers. Therefore, using oil and gas to make plastic for those containers is a wasteful use of a scarce resource. That is, by itself, a sufficient reason to conclude that the statutory classification satisfies the requirements of the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of the State of Minnesota should be reversed.

Respectfully submitted.

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